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Can States Assert Counterclaims Against Investors in BIT Proceedings?

Jean Kalicki (Independent Arbitrator) · Monday, January 16th, 2012

The recent decision in *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1) is prompting renewed debate over whether ICSID arbitration, now the leading mechanism for investors to pursue treaty-based claims against host States, may also be used by those States to assert related counterclaims against the investors, allowing all such claims to be settled in a single forum. At issue are certain fundamental questions about the relationship between the ICSID Convention and investment treaties as an extrinsic source of consent to arbitrate.

Article 46 of the ICSID Convention expressly requires a tribunal, if requested by a party, to determine "counterclaims arising directly out of the subject-matter of the dispute"— unless the parties have agreed otherwise, and provided as a threshold matter that such claims "are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre." Yet few parties have made these requests. Even fewer parties have succeeded.

When consent to ICSID arbitration is founded on a contract rather than a treaty, few threshold jurisdictional issues arise in connection with State counterclaims, because contractual dispute resolution provisions are generally bilateral, allowing either party to the contract to assert claims for breach of the contract's terms. In such cases, ICSID tribunals have not hesitated to hear State counterclaims. In *Atlantic Triton v. Guinea* (ICSID Case No. ARB/84/1), the respondent's ability to bring its own claim for breach of contract worked against it on the merits; in rejecting the counterclaim, the tribunal stated that "it must be underscored that if Guinea itself considered Atlantic Triton responsible for the significant damages it claims to have suffered, it is surprising that Guinea did not take the initiative and institute arbitration proceedings following the rescission of the management Agreement but waited until Atlantic Triton filed its request for arbitration before making its claims" (¶ 4.2). In another case against Guinea where jurisdiction was also contract-based, *Maritime International Nominees Establishment v. Guinea* (ICSID Case No. ARB/84/4), the tribunal not only exercised jurisdiction over Guinea's counterclaim, but also upheld it, awarding Guinea damages resulting from the claimant's initiation of AAA proceedings in violation of the parties' agreement to resolve their disputes through ICSID jurisdiction.

With respect to treaty-based arbitrations, some tribunals have entertained respondent

counterclaims but rejected them on the merits. In *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia* (ICSID Case No. ARB/99/2), for example, without expressly addressing the issue of jurisdiction, the tribunal found that Estonia's counterclaim was belied by contradictory evidence in the record. Other tribunals have cited a respondent's failure to substantiate its counterclaim. This was the case in *Gustav F. W. Hamester GmbH & Co. KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), where respondent Ghana, after presenting a counterclaim in the relief section of its counter-memorial, failed to make any further arguments in favor of either jurisdiction or a decision on the merits. The tribunal highlighted that "the BIT recognises that the State party may be 'aggrieved' and 'shall have the right to refer the dispute to' arbitration," but it ultimately held that "in the absence of any submissions on the nature of the Respondent's counterclaim under the BIT, the Tribunal is unable to analyse whether it is capable, in accordance with Article 46 of the Convention, of falling within the parties' scope of consent" (¶¶ 354–55).

By contrast, the recently-decided *Roussalis* case squarely presented the question of jurisdiction over treaty-based counterclaims by a respondent State. The majority of the tribunal held that the BIT in question contained no consent for the submission of respondent State counterclaims.

Primarily a dispute about a dispute, the case in *Roussalis* centered around the alleged breach by the claimant of a share purchase agreement, and, in response, the pursuit by Romanian authorities of various domestic remedies. Claiming that Romania's actions constituted "a series of malicious and unjustifiable acts" (¶ 10), the claimant initiated proceedings before ICSID, under the Greece-Romania BIT. Romania, for its part, submitted a counterclaim alleging that the claimant had breached its obligations under the share purchase agreement. It agreed to suspend any domestic proceedings making similar claims during the pendency of the ICSID arbitration.

After considering — and rejecting — each of the claimant's treaty claims, the tribunal proceeded to determine whether it had jurisdiction over Romania's counterclaim. Consistent with the decisions on counterclaims under the UNCITRAL Rules (*see, e.g., Saluka v. Czech Republic*), the tribunal noted that "[b]eing the party asserting that the Tribunal has jurisdiction to hear and determine the counterclaims which it seeks to bring before the Tribunal, the Respondent carries the burden of establishing that jurisdiction exists" (¶ 860). The threshold issue, according to the tribunal, was one of consent. Romania had argued that, because the ICSID Convention permits counterclaims — and the BIT did not expressly preclude them — by selecting ICSID as the forum to resolve the dispute, the claimant implicitly had consented to the submission of counterclaims.

A majority of the tribunal rejected this interpretation. The tribunal found that consent "must be determined in the first place by reference to the dispute resolution clause contained in the BIT. The investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State as expressed in the BIT" (¶ 866).

To this end, the tribunal noted that Article 9 of the BIT provided that "Disputes between an investor of a Contracting Party and the other Contracting Party

concerning an obligation of the latter under this Agreement, in relation to an investment of the former shall, if possible, be settled . . . If such disputes cannot be settled . . . *the investor* concerned *may submit* the dispute . . . to international arbitration" (emphasis added). The majority found that this language "undoubtedly limit[s] jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligation of the investor. The meaning of the 'dispute' is the issue of compliance by the State with the BIT" (¶ 869).

In dissent, Professor Michael Reisman stated that "when the States Parties to a BIT contingently consent, *inter alia,* to ICSID jurisdiction, the consent component of Article 36 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue." Though Professor Reisman stated he understood "the line of [the majority's analysis," he also stated that it produced "an ironic, if not absurd, outcome," in that the State was directed "to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant."

As Professor Reisman noted, the majority's decision in *Roussalis* marks the first time that jurisdiction over counterclaims has been rejected based on an absence of consent. It remains to be seen whether different tribunals, interpreting different and perhaps less narrow treaty language, will follow suit. At the very least, *Roussalis* has re-sparked the counterclaim debate among commentators. The case and the issue of State counterclaims more generally will be the subject of the first-ever OGEMID Mini-Seminar — a virtual panel intended to facilitate debate among members of the arbitration community — next week.

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